Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHAEL ATHANASIADES,

Petitioner,

v.

AL LUEBBERS, Superintendent
of the Potosi Correctional Center,

and

JEREMIAH W. "JAY" NIXON, Attorney General,
of the State of Missouri,

Respondents.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Missouri**

PETITION FOR WRIT OF CERTIORARI

MICHAEL ATHANASIADES
Pro Se
177475 (5A-29)
Potosi Corr. Center
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Mineral Point, Mo. 63660

35 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Does the "fraud upon the court" rule apply in criminal cases?

(2) Was the judgment of the court procured through fraud upon the court, where the prosecutor contrived the conviction through fabricated forensic evidence concocted in a pre-trial scheme and conspiracy with the medical examiner, and where resulting from a corrupt monetary motive, defense counsel betrayed his client and connived at his defeat, by assisting the prosecutor in the execution of the scheme?

(3) Was Petitioner's fundamental right of access to the courts under the Fourteenth Amendment violated when the State Supreme Court denied the habeas corpus petition without requiring the state to answer, or giving the Petitioner an opportunity to prove his allegations, where the petition made a prima facie showing of unlawful confinement?

PARTIES

The parties to this case are set out in the caption of this case. Mr. Don Roper, however, is now the superintendent of the Potosi Correctional Center, and is an appropriate respondent.

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OPINIONS BELOW

The Order of the Supreme Court of Missouri denying the petition for a writ of habeas corpus appears at Appendix A to the petition, and is unpublished.

The Order of the Missouri Court of Appeals denying the petition for a writ of habeas corpus appears at Appendix B to the petition and is unpublished.

The Order and Judgment of the Circuit Court of Washington County, Missouri dismissing the petition for a writ of habeas corpus appears at Appendix C to the petition and is unpublished.

JURISDICTION

The date on which the Supreme Court of Missouri denied my petition for a writ of habeas corpus was September 24, 2002. A copy of that Order appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, § 2, cl. 2 provides in relevant part:

> In all of the other cases before mentioned, the Supreme Court shall have appellate Jurisdiction both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Const. Amend. XIV, § 1 provides in relevant part:

> [N]or shall any state deprive any person of life, liberty or property without due process of law. . . .

U.S. Const. Amend. VI, provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defense.

Missouri Const. art. I, § 12, provides in relevant part:

> That the Privilege of the Writ of Habeas Corpus Shall Never be Suspended.

532.010, RSMo., states in relevant part:

> Every person committed, detained, confined or restrained of his liberty, within this state, for any criminal or supposed criminal matter, or under any pretence whatsoever, except when, according to the provisions of this chapter, such person can be neither discharged nor bailed, or otherwise relieved, may prosecute a writ of habeas corpus as herein provided, to inquire into the cause of such confinement or restraint.

Missouri Supreme Court Rule 91.05 states in relevant part:

> A court to which a petition for a writ of habeas corpus is presented shall forthwith grant the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the petition that the person restrained is not entitled thereto.

STATEMENT OF THE CASE

On August 18, 1990, a jury found Petitioner guilty of murder in the first degree and of armed criminal action in the shooting death of his wife. On December 10, 1990, the circuit court of the City of St. Louis, sentenced Petitioner to life in prison without the possibility of parole, plus 25 years. The court of appeals affirmed the judgment on direct appeal, but reversed and remanded the judgment of the (29.15) hearing court for further proceedings with instructions to consider only issues regarding ineffective assistance of counsel. (*See State v. Athanasiades*, 857 S.W.2d 337 (Mo. App. 1993). There were five shots fired during the shooting incident. Petitioner testified that an argument ensued between himself and his wife over their two-year-old baby boy he was holding in his arms, and that his wife attacked him with a butcher knife trying to kill him. That he fired the weapon in defense of his life and in fear of grave harm to the child. (T.Tr. 1290-1322). Notably, it was also the state's position that Petitioner got into an argument with his wife, over the child the Petitioner was holding in his arms during the altercation. (T.Tr. 229-230). The sole and decisive question for the jury was whether or not, the defendant had acted in lawful self-defense. To obtain a conviction, the prosecutor fabricated a theory that following the third shot, the victim fell wounded on the floor at which time the defendant fired two shots at his wife killing her on the floor. (T.Tr. 330-331). To support this theory, the prosecutor, Mr. Nels C. Moss Jr., met in advance of trial with Dr. Michael Graham who performed the autopsy in the case. The two conspired and devised a scheme to present fabricated forensic evidence in support of the false theory stated above.

When Dr. Graham performed the autopsy a year earlier, he issued an official written report regarding his findings. With regard to the edges of the abdominal exit wound, Dr. Graham stated: "the edges are clean." According to the pre-trial plot, however, Dr. Graham told the jury that the edges of the abdominal exist wound were "scraped", constituting a "shored-supported" exit wound. Based on this fabrication, Dr. Graham concluded that it was consistent with this evidence for the victim to have been shot from above as she lay wounded on the floor. (T.Tr. 994-997).

In addition to eliciting Dr. Graham's fabricated testimony, Mr. Moss misled the defense expert Dr. Charles Petty, into conceding Dr. Graham's fabricated evidence and conclusions. (T.Tr. 1567-68).

The fabricated shored wound was the central issue in the state's case. Toward the end of the trial, the Judge told the attorneys: "You've talked about the shored wound six thousand million times in this trial." (T.Tr. 1615-1616).

In his closing argument, Mr. Moss compounded the due process violations by stating to the jury:

> Now we talked about, we talked about what really happened here. What really happened here. One thing that doesn't lie for sure in this case is the physical evidence. Some people may try to lie about it which is exactly what the defendant did. * * * How do we know that? Because Dr. Graham who doesn't stretch the truth, said its consistent with her left wrist being under her body right where the bottom of your ribs are, because **it's a shored wound**. Wounds are different as both doctors told you. Even Dr. Petty said well, her wrist had to be up against her chest.

> Even he would have had to admit that. But if you look at the pictures of her chest in the morgue, you can see the red around there. So she was lying down, unless you assume, of course, after being shot a number of times, of course, she is wandering around like this, tucking her wrist in, pressing it tight enough so that it supports it when the bullet comes through.
>
> [(T.Tr. 1719-1720) (emphasis added)].

Evidence of a pre-trial scheme and conspiracy establishing fraud upon the court

During the second post-conviction hearings, Dr. Graham made admissions against interest, exposing the pre-trial scheme and conspiracy between himself and the prosecutor. Dr. Graham testified that when he performed the autopsy, he found the edges of the abdominal exit wound were "clean" as oppose to being "scraped," and that the autopsy report was correct. (Hr.Tr. 157-59 April 7, 1994; Hr.Tr. 35, July 22 1994). More importantly, Dr. Graham testified in the physical presence of Mr. Moss, that he and Mr. Moss **met in advance of trial, and discussed the presentation of the shored exit wound evidence**, in support of the theory that the victim was shot from above after falling to the floor. (Hr.Tr. 171 April 7, 1994; Hr.Tr. 35-36 July 22 1994). Mr. Moss who was counsel for the state in those proceedings, made no attempt to elicit any testimony to the contrary from Dr. Graham.

Defense counsel's corrupt motive

Prior to trial, Petitioner's defense counsel entered into a highly improper agreement with Petitioner, creating a corrupt motive to seek a conviction against his client. At the time, Petitioner was free on $500,000 bond, $400,000 of which was cash. Counsel charged Petitioner $100,000 for the cost of the trial, with half down and half to be collected from the bond office at the end of trial. Counsel also agreed to file an appeal in the event of a conviction for an additional $50,000. Counsel drafted a bond assignment, giving himself the authority to collect $100,000 from the bond office, if the defendant became convicted.

Counsel's betrayal of his client

When defense counsel cross-examined Dr. Graham on the fabricated shored wound evidence, instead of impeaching the witness with the autopsy report, counsel re-elicited the fabrication, with more impetus, clarity and prejudice than that accomplished by the prosecutor on direct. The following illustrates the point.

> Q. [By counsel Shaw] Now you were asked about the entrance into the wrist. **If this young lady were on the floor and she was lying on her arm**, would that cause pressure on the exit wound, the exit wound from the body before it gets into the wrist? Do you understand what I'm saying?
>
> A. [By Dr. Graham] Yes, the weight of the body would press the rib cage exit site on to the wrist.
>
> Q. And what would that cause? What kind of a – what would you expect that kind of pressure,

what effect would that have on the exit wound and the entrance wound into the wrist?

A. It will often cause what's called the supported exit where there is some scraping around the edges of the exit.

Q. **And did you find that?**

A. **Yes.** [(T.Tr. 1020-1021) (emphasis added).]

Counsel kept the defense expert in the dark

Counsel also kept Dr. Petty in the dark, thus allowing the prosecutor to mislead the defense expert into conceding the state's fabricated evidence indicated above.

During the hearings under remand, Dr. Petty testified that: "I was uncertain as to what the state's theory was. I was not told by Mr. Knappenburger and later by Mr. Shaw exactly what my mission was". (Hr.Tr. 306 April 8, 1994) Dr. Petty continues that his main "preparation" with trial counsel was at dinner once he arrived in St. Louis for the trial. (Hr.Tr. 306-08 April 8 1994).

Sworn admissions against interest by defense counsel

During the first post-conviction hearings occurring on Jan. 23, 1992, defense counsel testified that he knew at the time he cross-examined Dr. Graham, that the autopsy report was in direct conflict with the finding of a shored exit wound. (Hr.Tr. 101). That he understood at that time that clean was the exact opposite of shored. (Hr.Tr. 98). That the shored wound was the key evidence in support of the theory that the defendant shot his wife after she fell to the floor, and thus, guilty of murder in the first degree.

(Hr.Tr. 83-87). When post-conviction counsel asked Mr. Shaw why he did not impeach Dr. Graham with the report, counsel Shaw concealed his corrupt conduct by actually committing perjury. He stated that he did not want to get back into it and get the jury to again hear all about the shored wound and why it was done on the floor. (Hr.Tr. 104). During the hearings under remand occurring in 1994, however, counsel Shaw admitted under oath that he in fact re-elicited the shored wound evidence from Dr. Graham, in a manner that was the functional equivalent of prosecuting his own client. (Hr.Tr. 90-91 Dec. 8 1994).

New reliable evidence of innocence

During the second post-conviction hearings, forensic pathologist Dr. Jay Dix testified that after examining the relevant ballistic and forensic evidence in the case, Petitioner's wife was fully upright to a scientific level of certainty, during the infliction of the last two shots, and that the trajectory angles along with related forensic evidence, was consistent with the defendant's trial testimony, that he was being pursued by his wife during the infliction of the last two shots. (Hr.Tr. 55-56, 62-66, 80, of July 22 1994 Hearings).

Forensic pathologist Dr. Charles Petty, conducted an in-depth analysis of all the evidence in the case. He testified that the ballistic and forensic evidence, refuted the state's theory of the case, and supported the defendant's trial testimony. (Hr.Tr. 308-341 April 8 1994 Hearings).

Most importantly, the state's forensic pathologist, Dr. Michael Graham, after examining the trajectory angles of the last two shots, in conjunction with related forensic

evidence, testified that the evidence was consistent with the defendant's trial testimony, that he was being pursued by his wife when the last two shots were inflicted. (Hr.Tr. 187-190 April 7 1994 Hearings).

Federal questions presented to the state courts

The facts in support of the federal questions were concealed by the prosecutor and defense counsel, and could not have been discovered through due diligence in time to be presented in the post-conviction motion, or on direct appeal. These facts were discovered during the first and second post-conviction proceedings under rule 29.15. The only remedy under Missouri law in this instance, is a petition for a writ of habeas corpus under rule 91.

On June 29, 2000, petitioner presented the federal questions to the circuit court of Washington County, Missouri, in a habeas corpus petition. On September 17, 2001, the circuit court issued an order and judgment dismissing the petition without a hearing. The court did not pass on the federal questions. The court misinterpreted the ground as a subornation of perjury claim. It then denied the ground on a procedural default for failure to raise the ground in the motion for new trial. (*Id.*, App. pp. 6-7).

With regard to counsel's corrupt conduct, the court rejected the ground under the *Strickland* standard. (*Id.*, App. 7).

On June 4, 2002, Petitioner presented the federal questions to the Missouri Court of Appeals, in a petition for a writ of habeas corpus. The court entered an order the following day, denying the petition without requiring the

state to answer, or giving the Petitioner an opportunity to prove his allegations.

On September 4, 2002, Petitioner presented the federal questions to the Supreme Court of Missouri in a petition for writ of habeas corpus. On September 24, 2002, the Court entered an order denying the petition without requiring the state to answer, or giving the Petitioner an opportunity to prove his allegations.

The Court's decision of the federal questions was necessary to its determination of the cause, for at least three reasons. Under Missouri law, habeas corpus lies to provide relief on a claim not raised on post-conviction motion, if the Petitioner can assert either: a claim of actual innocence under *Schlup v. Delo*, 513 U.S. 298 (1995), or meet the cause and prejudice standard under the federal jurisprudence. (*See Brown v. State*, 66 S.W.3d 721 (Mo. banc 2002) at 731). The facts of this case meet either criteria. Furthermore, under the facts of this case, there can be no adequate state law ground that could bar review of the federal questions presented in the petition.

This Court has jurisdiction to review the decision of the Supreme Court of Missouri on a writ of certiorari.

REASONS FOR ALLOWANCE OF THE WRIT

Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. This case

presents judicial corruption of unprecedented proportions, leading to the conviction and imprisonment of an innocent person. Fraud upon the court is conclusive in this case. It is supported by sworn admissions against interest by the very perpetrators of the fraud. This case demands the exercise of this Court's discretionary power, to address important questions of: (a) does the fraud upon the court rule apply in criminal cases with equal force as it does in civil cases, (b) was the judgment of the trial court procured through fraud upon the court for which equity must grant relief, and (c) was the Due Process Clause of the Fourteenth Amendment violated when the court below summarily denied the petition even though the petition made a prima facie showing of unlawful confinement.

Question 1: The "fraud upon the court rule" should apply in criminal cases with equal force.

The "fraud upon the court" rule authorizes a court to set aside a civil judgment procured through fraud upon the court, despite the strong statutory policy of finality of judgments, on the theory that a "decision procured through fraud upon the court is not in essence a decision at all and never becomes final." *Kenner v. Commissioner of Internal Revenue*, C.A.7th, 1968, 387 F.2d 689, certiorari denied, 393 U.S. 841. Although the procedural safeguards of a criminal proceeding are greater than those of a civil action, there are instances where those safeguards become meaningless. When resulting from a corrupt monetary motive, a defense attorney joins the prosecutor in procuring a criminal conviction through fraud upon the court, and then preserves nothing of substance for appellate review, all the procedural safeguards are nullified. By the

time a criminal defendant discovers that fraud was perpetrated upon him and upon the court by the prosecutor and defense counsel in the procurement of the judgment, the time limits for raising any claim of substance in a post-conviction motion or on direct appeal have long past. In that instance, the criminal defendant is locked behind impenetrable procedural barriers. The only state remedy available is a petition for a writ of habeas corpus. But if the legal principles governing the "fraud upon the court" rule, do not apply with equal force to a judgment obtained in a criminal proceeding, then the criminal defendant is left without any state remedy to vindicate the federal constitutional violations occurring in his trial proceedings. He is locked in prison, even though, in a real sense, he has never had his day in court. That is one good reason why the fraud upon the court rule should apply in criminal cases with equal force, as it does in civil actions. To limit the rule only to civil cases would remove any possible state remedy for the vindication of federal constitutional violations, in the face of judicial corruption.

Question 2: Fraud was perpetrated upon the court by the prosecutor and by defense counsel, in procuring the judgment of the court.

This was not the first time prosecuting attorney, Nels C. Moss, violated the rules of court. Five years earlier, the Court of Appeals stated the following with regard to Mr. Moss' tactics:

> "Where, as in this case, that record discloses a patent effort to deprive a defendant of a fair trial, the onus for the delay and added expense should be directed toward the prosecutor who caused it.

> This is especially true when, rather than resulting from youthful zeal, the error is but one example of a consistent pattern of improper tactics reflected by other transcripts in cases tried by the same experienced prosecutor."
>
> (*Id.*, *State v. Goodson*, 690 S.W.2d 155 (Mo. App. E.D. 1985) at 161)).

While the misconduct in *Goodson* was an improper tactic of the garden variety, in Petitioner's case, Mr. Moss went as far as corrupting the medical examiner, Dr. Michael Graham, into committing perjury in a first degree murder trial, leading to the conviction and imprisonment of an innocent person.

Factually this case is straight forward. Petitioner was charged with murder in the first degree and with armed criminal action in the shooting death of his wife, G. Zeta Athanasiades. He pled not guilty to the charges. He relied on the sole defense of self-defense and in fear of grave harm to the child in his arms, when his wife attacked him and tried to kill him with a butcher knife. To render the defense presented invalid, and thus require a guilty verdict, Mr. Moss plotted and conspired with Dr. Graham in advance of trial, to present a fabricated shored exit wound, in support of the false theory that the defendant killed his wife by shooting her twice after she fell wounded to the floor. The execution of this scheme and conspiracy included the cooperation and participation of the defense attorney Mr. Shaw, who as a result of a highly improper agreement with Petitioner, stood to collect an additional fifty thousand dollars in the event of a conviction.

Fraud upon the court rule

The spirit of the "fraud upon the court" rule is applicable whenever the integrity of the judicial process has been undercut. No court system of justice can function without safeguards against actions that interfere with the administration of justice. This concern must be balanced against the necessity for finality of judgments; thus, only actions that actually subvert the judicial process can be the basis for upsetting otherwise settled judgments and decrees. Professor Moore's definition is often cited:

> Fraud upon the court should . . . embrace only that species of fraud which does, or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform its impartial task of adjudication cases that are presented for adjudication, and relief should be denied in the absence of such conduct.

(*See* 7 Moore's Federal Practice and Procedure ¶ 60.33.)

The author cites two Supreme Court decisions that illustrate the role of attorney actions in the fraud on the court analysis. Moore distinguishes between *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944), in which the Court did find fraud and *U.S. v. Throckmorton*, 98 U.S. 61 (1878), in which the Court did not find fraud. While the actions taken in both cases were similar – false documents were put before the court – the attorney was implicated in *Hazel-Atlas* as one of the perpetrators, while the attorney in *Throckmorton* was not. (*See* Moore's Federal Practice and Procedure, at 60-358-59).

In Petitioner's trial, there was more than the perjured testimony of Dr. Graham. The state's chief counsel, Mr. Moss, plotted with Dr. Graham in advance of trial, to present fabricated forensic evidence through perjured testimony, and conspired with Dr. Graham to carry out the plot. In addition, while posing as a defense attorney, Mr. Shaw betrayed his client's interest and connived at his defeat, by assisting the prosecutor in the execution of the scheme. Like the prosecutor, counsel Shaw prosecuted his own client with forensic evidence that destroyed the defense presented, while knowing at that time, the evidence was false, and by keeping defense expert Dr. Charles Petty in the dark, so as to be misled by the prosecutor. The foregoing actions of these two attorneys were such a violation of a lawyer's duty to the court – a duty imposed not alone by principles of honesty and good morals but also by a code of ethics adopted as rules of court, as to amount to fraud upon the court.

In addressing whether a final judgment should be set aside, the Court in *Throckmorton* noted that the general rule is to respect finality of judgments over the doctrine that fraud may vitiate judgments. Having noted this rule, the Court further stated:

> But there is an admitted exception to this general rule, in cases where, by reason of something done by the successful party to a suit, there was, in fact no adversary trial or decision of the issues in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced upon him by his opponent, as by keeping him away from court; a false promise of compromise; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; **or**

> **where the attorney regularly employed corruptly sells out his client's interest to the other side** – these, and similar cases which show that there has never been a real contest in the trial or hearing of the issues in the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing.
>
> (*Id., Throckmorton*, at 65 supra) (emphasis added).

The fact that prosecutor Moss presented fabricated forensic evidence to obtain the conviction, "as a direct result of a pre-trial scheme and conspiracy with Dr. Graham," is indisputable.

The fact that defense counsel Shaw corruptly betrayed Petitioner's interest and connived at his defeat, is indisputable.

The fact that defense counsel had an improper agreement with Petitioner to collect fifty thousand dollars more in the evident of a conviction, and that counsel did in fact collect said extra sum at the end of trial, is indisputable.

The fact that new reliable evidence of innocence was adduced in the post-conviction proceedings, is indisputable.

Applying the forgoing legal principles to the judicial corruption occurring in Petitioner's trial, leads to the inescapable conclusion that in a real sense, Petitioner never had his day in court. The judgment of the trial court was procured through fraud upon the court.

Question 3: Petitioner's fundamental right of access to the court under the Fourteenth Amendment was violated when the court below denied the habeas petition without requiring the state to answer, or giving Petitioner an opportunity to prove his allegations.

The Due Process Clause of the Fourteenth Amendment requires that state prisoners must be "given some clearly defined method by which they may raise in [state court] claims of denial of federal rights." *Young v. Ragen*, 337 U.S. 235 (1949). In *Williams v. Kaiser*, 323 U.S. 471 (1945), and *Tomkins v. Missouri*, 323 U.S. (1945), the Missouri Supreme Court did not require the state to answer the petition for writ of habeas corpus and refused to allow the petitioner an opportunity to prove his allegations. Instead, the Missouri Supreme Court summarily denied the respective habeas petitions by declaring that they "failed to state a cause of action." This Court ruled that because the court failed to accord the state prisoners a full and fair hearing on their federal constitutional claims, the decisions denying those claims had to be reversed.

Missouri Supreme Court Rule 91.05 provides:

> "A court to which a petition for a writ of habeas corpus is presented shall forthwith grant the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the petition that the person restrained is not entitled thereto."

The habeas petition alleged that Petitioner's confinement was in violation of the Fourteenth Amendment, because the judgment of the court was procured through

fraud upon the court, and because Petitioner was actually innocent of the underlying criminal convictions. Accompanying the petition was a document entitled "suggestions in support of Petitioner's petition for a writ of habeas corpus." In that document, Petitioner supported his factual allegations with citations to evidence in the record, consisting of sworn admissions against interest by Dr. Graham, establishing Dr. Graham's perjured testimony during trial, and the pre-trial scheme and conspiracy between the prosecutor and Dr. Graham, to present during trial the fabricated shored exit wound evidence, in support of the false theory that the victim was killed by being shot twice after falling wounded to the floor. In addition, Petitioner cited to evidence in the record, consisting of sworn admissions against interest by defense counsel Shaw, establishing the corrupt betrayal of his client and his participation and assistance in the execution of the prosecutor's scheme and conspiracy with Dr. Graham. Also, Petitioner provided the court with documentary evidence of counsel's corrupt monetary motive. Furthermore, Petitioner supported his constitutional claim with new reliable evidence of innocence from three forensic pathologists, including the state's expert Dr. Michael Graham. Clearly, the petition stated a cause of action. Petitioner requested a hearing on his petition. The Supreme Court of Missouri denied the petition without requiring the state to answer or giving the Petitioner an opportunity to prove his allegations.

It is a fundamental constitutional principle under the Fourteenth Amendment that a prisoner's right of access to the courts cannot be obstructed or denied. *Johnson v. Avery*, 393 U.S. 483 (1969). The decision of the court below deprived Petitioner of his fundamental constitutional right of access to the courts.

The Fourteenth Amendment provides in relevant part:

> [N]or shall any state deprive any person of life, liberty or property, without due process of law. . . .

But for the present fraudulent conviction, Petitioner, a man at the age of sixty, is a law abiding innocent person with a flawless record throughout his life. Enforcement of the trial court's judgment is manifestly unconscionable. To allow the decision of the court below to remain, would in effect insulate the fraud perpetrated upon the court from judicial review. It would render the Fourteenth amendment's Constitutional guarantee meaningless, and perpetuate the injustice committed against an innocent person and the affront against the administration of justice.

CONCLUSION

In light of the extraordinary issues involved, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Petitioner Pro Se

APPENDIX A

In the Supreme Court of Missouri

September Session 2002

State ex rel. Michael Athanasiades,

Petitioner,

No. **SC84754** **HABEAS CORPUS**

Al Luebbers, Superintendent, and
Jeremiah W. (Jay) Nixon, Attorney General

Respondents.

Now at this day, on consideration of the petition for writ of habeas corpus herein to the said respondent, it is ordered by the Court here that the said petition be, and the same is hereby denied. Petitioner's motion for Court's order directing state to provide this Court with records and files overruled.

STATE OF MISSOURI – Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 2002, and on the 24th day of September, 2002, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 24th day of September, 2002.

/s/ Thomas Simon Clerk

/s/ Norma Jean Creach *D.C.*

BEST AVAILABLE COPY

APPENDIX B

[LOGO]

In The Missouri Court of Appeals
Eastern District

DIVISION V

MICHAEL ATHANASIADES,	) No. ED81283
Petitioner,	) Writ of Habeas Corpus
vs.	)
AL LUEBBERS, Superintendent Potosi Correctional Center,	)
Respondent.	)

ORDER

Petitioner has filed a Petition for Writ of Habeas Corpus along with Exhibits.

Being duly advised in the premises, the Court Denies Petitioner's Petition for Writ of Habeas Corpus.

SO ORDERED.

DATED: 6/5/02

/s/ Gary M. Gaertner, Sr.
Gary M. Gaertner, Sr.
Presiding Judge
Writ Division V

cc: Michael Athanasiades, Pro Se Petitioner
Jeremiah W. (Jay) Nixon, Attorney General

APPENDIX C

IN THE CIRCUIT COURT OF WASHINGTON COUNTY
STATE OF MISSOURI

STATE EX REL MICHAEL ATHANASIADES, Petitioner, v. AL LUEBBERS, and JEREMIAH W. (JAY) NIXON, Respondents.	)	No. CV1000-260CC

ORDER AND JUDGMENT DISMISSING PETITIONER'S FIRST AMENDED WRIT OF HABEAS CORPUS

(Filed Sep. 17, 2001)

NOW on this 17th day of ~~August~~ September, 2001, the Court having reviewed the entire file herein finds that the Petitioner, Michael Athanasiades, alleges five points in support of his First Amended Writ of Habeas Corpus. The Court makes the following findings of fact and conclusions of law on the individual points.

Statement of Custody and Parties

Petitioner, Michael Athanasiades, is currently incarcerated at the Potosi Correctional Center located in Mineral Point, Missouri, pursuant to the sentence and judgment of the Circuit Court of the City of St. Louis, Missouri. Petitioner was found guilty of first degree murder and armed criminal action for which he was sentenced to life without the possibility of parole and

twenty-five years imprisonment with the Missouri Department of corrections, said sentences to be served consecutively. Petitioner has yet to complete service of these sentences. Respondent Al Luebbers, Superintendent of the Potosi Correctional Center, is petitioner's custodian and is the proper party respondent.

Procedural History

On August 18, 1990, after a trial by jury, petitioner was convicted of first degree murder and armed criminal action. The Circuit Court for the City of St. Louis, Missouri sentenced petitioner to life without possibility of parole and twenty-five years to be served consecutively. Petitioner filed a motion for post-conviction relief under Missouri Supreme Court Rule 29.15. After an evidentiary hearing, the motion court denied petitioner's second amended motion.

Petitioner then filed a consolidated appeal in which he appealed his conviction and the denial of his Rule 29.15 motion. On May 11, 1993, the Missouri Court of Appeals affirmed petitioner's conviction and sentence. With regard to the denial of petitioner's motion for post-conviction relief, the court affirmed in part, reversed in part and remanded with directions. *State v. Athanasiades*, 857 S.W.2d 337 (Mo.App. 1993). After a hearing on remand, petitioner's Rule 29.15 motion was denied, and the Missouri Court of Appeals affirmed. Petitioner also filed two Motions to Recall the Mandate, claiming ineffective assistance of appellate counsel and prosecutorial misconduct. These motions were also denied.

On April 16, 1996, petitioner filed a pro se petition for a writ of habeas corpus in the United States District Court

for the Eastern District of Missouri under 28 U.S.C. §2254. After retaining counsel, petitioner filed his first amended petition in federal court on December 6, 1996, raising five grounds for habeas relief. Petitioner subsequently dismissed two of those counts. The counts addressed by the federal court are as follows:

a. Petitioner's constitutional rights were violated because the state contrived the convictions through the known use of fabricated evidence and perjured testimony and deliberately suppressed evidence that would have impeached and refuted testimony given against him;

b. Petitioner's constitutional rights were violated because the prosecutor knowingly presented false serology evidence concerning blood on the knife seized at the scene and failed to disclose the fact that the knife handle was not conducive to fingerprints; and

c. Petitioner was denied the effective assistance of counsel.

On January 21, 2000, the United States Magistrate Judge issued a Report and Recommendation, recommending that petitioner's petition for habeas corpus be dismissed, specifically finding that petitioner had procedurally defaulted. This Report and Recommendation was adopted by the District Court Judge on August 28, 2000 and petitioner's petition for habeas corpus was dismissed.

Point One

Petitioner procedurally defaulted on his claims that the prosecutor knowingly presented fabricated evidence and perjured testimony; that the prosecutor further deliberately and fraudulently suppressed such a scheme from the defense and the court at trial; and that his trial counsel was ineffective in his examination of Dr. Michael Graham, the medical examiner who conducted the autopsy on the victim. *State ex rel. Simmons v. White*, 866 S.W.2d 43, 446 (Mo.banc 1993). Petitioner failed to raise these claims at the earliest possible opportunity.

Upon a review of the federal habeas petition, the federal court determined that petitioner was procedurally defaulted on this claim. Although petitioner raised this claim in state court[1], the Missouri Court of Appeals declined to review this claim of error because petitioner failed to plead sufficient facts to support his contention. *State v. Athanasiades*, 857 S.W.2d 337, 342 (Mo.App. 1993). Because petitioner failed to satisfy state procedural requirements that he plead facts sufficient to support his claim, he was procedurally barred from habeas review. To the extent that petitioner raised this claim on direct appeal, it is still procedurally barred because this claim was not raised in petitioner's motion for a new trial. Because petitioner failed to raise either aspect of this claim pursuant to applicable state procedural rules, the entire claim is procedurally defaulted. *Malone v. Vasquez*, 138 F.3d 711, 716 (8th Cir. 1998).

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[1] He raised it as an appeal to point qq in his Second Amended Rule 29.15 Motion.

Petitioner also contends in Point One that the prosecutor failed to disclose evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). In reviewing this claim, the federal court determined that petitioner had available to him at trial Dr. Graham's autopsy report, he had heard the testimony of Dr. Graham, he had ample opportunity to cross-examine Dr. Graham and he had his own expert witness to refute Dr. Graham's testimony. Because *Brady, supra* only requires the government to provide a criminal defendant with any evidence in its possession which is favorable to the defendant and which is material to the guilt or innocence of the defendant or to punishment, the trial prosecutor in this case had no obligation to disclose that Dr. Graham would testify differently than his autopsy report. The federal court also found petitioner's contention to be meritless. This Court agrees.

Finally, Petitioner complains in Point One about the conduct of his counsel during trial. The federal court also reviewed this claim that petitioner received ineffective assistance of trial counsel. Again, the federal court found the contentions were meritless. Petitioner offers no reason here to reconsider the federal court's analysis.

The federal court, in reviewing the merits of these claims, specifically found that none of Petitioner's assertions regarding Dr. Graham's testimony constituted "new evidence" that was not available to petitioner at trial. Moreover, this Court finds that petitioner has failed to plead any "newly discovered evidence" to satisfy the actual innocence component of the miscarriage of justice standard. *Clay v. Dormire*, 37 S.W.2d 214 (Mo.banc 2000). Point One is denied.

Point Two

Petitioner has failed to plead facts establishing a violation of his constitutional rights as to Point Two. Petitioner contends that the prosecutor committed a fraud upon the court by opposing petitioner's motion for new trial. Opposing a motion for a new trial does not constitute fraud, especially where, as here, it is apparent that there was no false testimony adduced at trial. Point Two is denied.

Point Three

Petitioner procedurally defaulted on his claim that there was error before the Rule 29.15 court. *State ex rel. Simmons*, 886 S.W.2d at 446. When there is error before the post-conviction trial court, that can and should be the subject matter of a post-conviction appeal. Missouri Supreme Court Rule 29.15(k). Petitioner fails to establish that he was unaware of this claim during his direct or post-conviction appeals. Petitioner offers no legitimate reason to use a state habeas corpus proceeding as a second Rule 29.15 appeal. In any event, the premise of petitioner's contention is that the prosecutor opposed the grant of Rule 29.15 relief. That can hardly be the basis for a finding of "fraud." In addition, there is no constitutionally protected right to a post-conviction proceeding. Accordingly, this claim fails as a matter of law and petitioner is not entitled to habeas relief on this point. *Williams v. State of Missouri*, 640 F.2d 140 (8th Cir.), *cert. denied*, 451 U.S. 990 (1981). Point Three is denied.

Point Four

Petitioner procedurally defaulted as to Point Four. Petitioner contends that the Missouri Court of Appeals overlooked a ground on appeal. That contention was cognizable in a motion for rehearing under Missouri Supreme Court Rule 30.26, which petitioner did not pursue. Petitioner offers no legitimate basis to use state habeas in lieu of a proper rehearing motion. Point Four is denied.

Point Five

Petitioner has not established circumstances so rare and exceptional that a manifest injustice would result if habeas relief is not granted. *Clay*, 37 S.W.3d at 214. Petitioner has not established that any constitutional violation has probably resulted in the conviction of one who is actually innocent. *Clay, supra*. Further, petitioner has not established the requisite probability that it is more likely than not that no reasonable juror would have convicted him in the light of new evidence of innocence. *Clay, supra*. Nor has Petitioner established that this new evidence was not available to him at the time of trial. Point Five is denied.

ACCORDINGLY, IT IS THE ORDER AND JUDGMENT OF THIS COURT that Petitioner's Writ of Habeas Corpus be dismissed. This judgment is deemed final for appeal purposes. Costs are assessed against the Petitioner.

SO ORDERED!

/s/ Troy K. Hyde
TROY K. HYDE JUDGE
DATE: 9/17/01